

Lum (Migration) [2019] AATA 5139 (21 November 2019)

DECISION RECORD

DIVISION: Migration & Refugee Division

APPLICANTS: Ms Yee Ki Lum

CASE NUMBER: 1617084

DIBP REFERENCE(S): BCC2015/3004035

MEMBER: R. Skaros

DATE: 21 November 2019

PLACE OF DECISION: Sydney

DECISION: The Tribunal remits the application for a Temporary Business Entry (Class UC) visa for reconsideration, with the direction that the applicant meets the following criteria for a Subclass 457 visa:

- cl.457.321 of Schedule 2 to the Regulations.
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- Statement made on 21 November 2019 at 10:04am

CATCHWORDS

MIGRATION – Temporary Business Entry (Class UC) visa – Subclass 457 (Temporary Work (Skilled)) – member of family unit of primary visa applicant – de facto partner – genuine and continuing relationship – decision under review remitted

1.

2. **LEGISLATION**

Migration Act 1959 (Cth), ss 5(1), 5CB(2), 65, 360(2)(a)

Migration Regulations 1994 (Cth), rr 1.03, 1.12, 2.03A(2), Schedule 2, cl 457.321

STATEMENT OF DECISION AND REASONS

APPLICATION FOR REVIEW

3. This is an application for review of a decision made by a delegate of the Minister for Immigration on 29 September 2016 to refuse to grant the visa applicant a Temporary Business Entry (Class UC) visa under s.65 of the *Migration Act 1958* (the Act).
4. The visa applicant applied for the visa on 22 June 2015 on the basis of being a member of the family unit of Mr Mario Tempesta, who was the primary visa applicant for the Temporary Business Entry (Class UC) (Subclass 457) visa.
5. The delegate refused to grant the visa on the basis that cl.457.321 was not met because the applicant was not a member of the family unit of a person (the primary applicant) who, having satisfied the primary criteria, was the holder of a subclass 457 visa.
6. The Tribunal has before it information which indicates that Mr Tempesta is now the holder of a Subclass 457 visa. The Tribunal also has before it information which indicates that the applicant and Mr Tempesta are in a de facto relationship.
7. In reaching its decision the Tribunal did not consider a hearing to be necessary, as it was able to find in favour of the visa applicant on the basis of the material before it, pursuant to s.360(2)(a) of the Act.
8. For the following reasons, the Tribunal has concluded that the matter should be remitted for reconsideration.

CONSIDERATION OF CLAIMS AND EVIDENCE

9. The issue in this case is whether the applicant is a member of the family unit of a person who, having satisfied the primary criteria, is the holder of a subclass 457 visa.
10. The term 'member of the family unit' is defined in the s.5(1) of the Act as has having the meaning provided in the Regulations. Regulation 1.03 states 'member of the family unit' has the same meaning set out in r.1.12. As it applies in this case, r.1.12 says a person is the member of the family unit of another person (the family head) if he or she is a spouse or de facto partner of the family head.
11. De facto partner is relevantly defined in s.5CB of the Act which provides that a person is in a de facto relationship with another person to whom they are not married if they have a mutual commitment to a shared life to the exclusion of all others, the relationship is genuine and continuing, the couple live together, or do not live separately and apart on a permanent basis, and the couple are not related by family. In forming an opinion whether the applicant is in a de facto relationship the Tribunal may have regard to the matters set out in r.1.09A(3).
12. Persons claiming to be a in a de facto relationship must also meet the additional criteria in r.2.03A(2), that is, that both members of the couple must be at least 18 years old.
13. In this case, the applicant applied for the visa on the basis of being the de facto partner of Mr Tempesta (the primary applicant). The Department initially refused to grant Mr Tempesta a Subclass 457 visa. Mr Tempesta applied to the Tribunal for review of that decision. On 2 August 2018 the Tribunal set aside the Department's decision in relation to Mr Tempesta and the matter was remitted to the Department for reconsideration.

14. On 8 April 2019 the Tribunal received a copy of a notice issued by the Department on 7 September 2018 granting Mr Tempesta a Subclass 457 visa. The visa was granted from 7 September 2018 to 7 September 2022. The Tribunal has accessed the Department's electronic records and is satisfied that Mr Tempesta is still the holder of the visa as at the date of this decision. Accordingly, the Tribunal is satisfied that Mr Tempesta is a person who, having satisfied the primary criteria, is the holder of a Subclass 457 visa.
15. In relation to the issue of whether the applicant is a member of Mr Tempesta's family unit, on 18 November 2019, the Tribunal received the following information in support of that claim:
 - a. a statutory declaration by the applicant dated 13 November 2019 declaring that her relationship with Mr Tempesta began in 2014, that they have lived together for 5 years, have had a joint bank account since 2015 and share all the rent, utilities and food expenses, have travelled together and met each others families in Hong Kong and Italy and have been engaged in since 2016 and are waiting for life to settle before getting married;
 - b. a statutory declaration by Mr Tempesta dated 13 November 2019 also declaring that the relationship began in 2014, they have lived together for 5 years, have had a joint bank account since 2015 and share all the rent, utilities and food expenses, have travelled together and met each others families in Hong Kong and Italy and have been engaged in since 2016 and are waiting for life to settle before getting married;
 - c. letters jointly addressed to the applicant and Mr Tempesta regarding their joint rental of a property in Dianella, W.A. in 2016, together with a record of payment of a security bond and rental and utility statements for the property;
 - d. bank statements evidencing joint bank accounts in the names of the applicant and Mr Tempesta; and
 - e. a copy of the applicant's drivers learner's permit that includes her date of birth as September 1984.
16. The Tribunal has had regard to the evidence above and notes that the applicant and Mr Tempesta have been in an ongoing relationship for more than 5 years, live together, share joint liability for a rental property, have pooled bank accounts and financial resources, share responsibility for the day to day household expenses, share housework and living arrangements, represent themselves to others, including both their families, as being in a de facto relationship and are engaged with the intention of marrying once their situation has settled. There is also no evidence that the parties are related by family.
17. Accordingly, the Tribunal is satisfied that the parties are not married, they have a mutual commitment to a shared life to the exclusion of all others, the relationship is genuine and continuing, the couple live together, or do not live separately and apart on a permanent basis, and they are not related by family. On the basis of the above, the requirements of s.5CB(2) are met.
18. As the applicant was born in September 1984 and Mr Tempesta was born in November 1984, the Tribunal is also satisfied that the parties are at least 18 years old. The additional criteria in r.2.03A(2) is therefore met.
19. The Tribunal is satisfied on the evidence before it that the applicant is the de facto partner of Mr Tempesta, a person who holds a subclass 457 visa on the basis of satisfying the primary criteria. Accordingly, the Tribunal finds that the applicant is a member of the family unit of a

person (the primary applicant) who, having satisfied the primary criteria, is the holder of subclass 457 visa. The criteria in cl.457.321 is therefore met.

DECISION

20. The Tribunal remits the application for a Temporary Business Entry (Class UC) visa for reconsideration, with the direction that the applicant meets the following criteria for a Subclass 457 visa:
 - cl.457.321 of Schedule 2 to the Regulations.

R. Skaros
Senior Member